

CONTRACT #13
RFS # 332.05-037
FA # Pending

**Tennessee Student Assistance
Corporation (TSAC)**

VENDOR:
ELM Resources



STATE OF TENNESSEE
TENNESSEE STUDENT ASSISTANCE CORPORATION
SUITE 1510, PARKWAY TOWERS
404 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37243-0820
(615)741-3000 • 1-866-291-2675 • FAX (615)741-6101
www.CollegePaysTN.com

MEMORANDUM

RECEIVED

SEP 26 2008

FISCAL REVIEW

TO: Leni Chick, Fiscal Review Committee
FROM: Marcie Mills, Paralegal
DATE: September 26, 2008
SUBJECT: Non-Competitive Contract Summary

The Tennessee Student Assistance Corporation (TSAC) proposes to submit a non-competitive Contract with ELM Resources for the provision of student loan data routing services.

Pursuant to Chapter 413, Public Acts of 2003, TSAC is providing the information below for the review of the Fiscal Review Committee.

Summary of the Terms of the Contract

The Contract between the State of Tennessee, Tennessee Student Assistance Corporation (TSAC), and ELM Resources, is for the provision of student loan data routing services.

The Contractor shall provide an internet-based, non-proprietary, exchange and disbursement system that seamlessly connects the diverse computing platforms of schools, lenders, and guarantors while providing real-time loan inquiry to borrowers and guarantors, including, but not limited to:

- a student loan delivery system whereby loan requests are routed to and from TSAC, schools, servicers, and lenders;
- provide mapping services such that TSAC receives guarantee requests and loan demographics and loan change records in the applicable file format;
- provide a student loan maintenance system whereby adjustments to loan demographics and loan records are routed to and from TSAC, schools, their servicers, and lenders;
- provide disbursement services in response to notices from lenders and servicers; and
- provide primary customer service, training, and real time interfaces, to ensure that schools and lenders receive data routed efficiently, accurately, and timely.

The Contract is to be effective December 1, 2008, through November 30, 2013, with the maximum expenditure not to exceed three hundred ninety thousand dollars (\$390,000.00).

Justification for the Proposed Non-Competitive Contract:

Although ELM Resources has provided this service to TSAC since 1998, current market conditions, and the fact that total guarantor fees at ELM have remained flat since 2001, while loan volume has quadrupled, the Contractor is adopting new pricing guidelines. These structural modifications reflect their first material change in almost a decade. Therefore, the Contractor will now charge \$0.40 per loan record based on projected volume (155,000 annually).

Justification for the Non-competitive Procurement:

There are no reasonable and competitive procurement alternatives to the proposed Contract. The Contractor has provided TSAC with student loan data routing services since 1998.

Over thirty percent of Tennessee schools use ELM Resources exclusively for their loan processing services which would result in a loss of that share of the market if TSAC were to use another vendor.

REQUEST: NON-COMPETITIVE CONTRACT

APPROVED

Commissioner of Finance & Administration

Date:

Each of the request items below indicates specific information that must be individually detailed or addressed as required.

A request can not be considered if information provided is incomplete, non-responsive, or does not clearly address each of the requirements individually as required.

1) RFS #	332.05-037-09	
2) State Agency Name:	TENNESSEE STUDENT ASSISTANCE CORPORATION (TSAC)	
3) Service Caption :	STUDENT LOAN DATA ROUTING SERVICES	
4) Proposed Contractor :	ELM RESOURCES	
5) Contract Start Date : (attached explanation required if date is < 60 days after F&A receipt)	December 1, 2008	
6) Contract End Date IF <u>all</u> Options to Extend the Contract are Exercised :	November 30, 2013	
7) Total Maximum Cost IF <u>all</u> Options to Extend the Contract are Exercised :	\$390,000.000	
8) Approval Criteria : (select one)	<input type="checkbox"/> use of Non-Competitive Negotiation is in the best interest of the state	
	<input checked="" type="checkbox"/> only one uniquely qualified service provider able to provide the service	
9) Description of Service to be Acquired :		
<p>The Contractor shall provide an internet-based, non-proprietary, exchange and disbursement system that seamlessly connects the diverse computing platforms of schools, lenders and guarantors while providing real-time loan inquiry to borrowers and guarantors. The Contractor shall provide:</p> <ol style="list-style-type: none"> 1. a student loan delivery system whereby loan requests (for guarantee) are routed to and from TSAC and schools (and their servicers) and TSAC and lenders (and their servicers); 2. mapping services to schools (and their servicers) and lenders (and their servicers) having that need such that TSAC receives guarantee requests, loan demographics, and loan change records in TSAC's file format; 3. a student loan maintenance system whereby adjustments to loan demographics and loan change records are routed to and from TSAC and schools (and their servicers) and TSAC and lenders (and their servicers); 4. disbursement services in response to having received a notice from a lender (or its servicers); and 5. primary customer service, training, and real time interfaces, within current data standards, to ensure that both schools and lenders receive data routed efficiently, accurately, and timely. 		
10) Explanation of the Need for or Requirement Placed on the Procuring Agency to Acquire the Service :		
Although ELM Resources has provided this service to TSAC since 1998, current market conditions, and the fact that total		

guarantor fees at ELM have remained flat since 2001, while loan volume has quadrupled, the Contractor is adopting new pricing guidelines. These structural modifications reflect their first material change in almost a decade. Therefore, the Contractor will now charge \$0.40 per loan record based on projected volume (155,000 annually). This volume charge, effective December 1, 2008, will be based on TSAC's actual current-month volume, billed in arrears.

11) Explanation of Whether the Procuring Agency Bought the Service in the Past, & if so, What Procurement Method It Used :

TSAC has used the Contractor since 1998 for its student loan data routing services and has been charged a flat rate Affiliate fee.

12) Name & Address of the Proposed Contractor's Principal Owner(s) :
(not required if proposed contractor is a state education institution)

ELM RESOURCES

500 12th Street, Suite 300
Oakland, CA 94607

Jeffrey A. Connors, President and CEO
Maria Alvarez, Agent for Service of Process

13) Evidence of the Proposed Contractor's Experience and Length of Experience Providing the Service :

The Contractor has 20 years of experience in the student loan industry, providing student loan processing to over 2,200 schools, and its lenders represent more than 90% of the FFELP (Federal Family Education Loan Program) volume in the industry.

14) Documentation of Office for Information Resources Endorsement :
(required only if the subject service involves information technology; N/A to THDA requests)

select one:



Documentation Not Applicable to this Request



Documentation Attached to this Request

15) Documentation of Department of Personnel Endorsement :
(required only if the subject service involves training for state employees)

select one:



Documentation Not Applicable to this Request



Documentation Attached to this Request

16) Documentation of State Architect Endorsement :
(required only if the subject service involves construction or real property related services)

select one:



Documentation Not Applicable to this Request



Documentation Attached to this Request

17) Description of Procuring Agency Efforts to Identify Reasonable, Competitive, Procurement Alternatives :

There are no reasonable and competitive procurement alternatives to the proposed Contract. The Contractor has provided TSAC with student loan data routing services since 1998.

18) Justification of Why the State Should Use Non-Competitive Negotiation Rather Than a Competitive Process :
(Being the "only known" or "best" service provider to perform the service as desired will not be deemed adequate justification.)

Over thirty percent of Tennessee schools use ELM Resources exclusively for their loan processing services which would result in a loss of that share of the market if TSAC were to use another vendor.

REQUESTING AGENCY HEAD SIGNATURE & DATE :

(must be signed & dated by the ACTUAL procuring agency head as detailed on the Signature Certification on file with OCR— signature by an authorized signatory will be accepted only in documented exigent circumstances)

Richard G. Rhoda, Interim Executive Director
Agency Head Signature

Date

RFS #		Contract #	
332.05-037-09			
State Agency		State Agency Division	
Tennessee Student Assistance Corporation		Fiscal Office	
Contractor Name		Contractor ID # (FEIN or SSN)	
ELM Resources		<input type="checkbox"/> C- or <input checked="" type="checkbox"/> V- 95-450-4552	
Service Description			
Student loan data routing services			
Contract BEGIN Date	Contract END Date	Subrecipient or Vendor?	CFDA #
December 1, 2008	November 30, 2013		
Mark Each TRUE Statement			
<input checked="" type="checkbox"/> Contractor is on STARS		<input type="checkbox"/> Contractor's Form W-9 is on file in Accounts	
Allotment Code	Cost Center	Object Code	Fund
332.05	6006	82	25
FY	State	Federal	Interdepartmental
2009		\$ 78,000.00	
2010		\$ 78,000.00	
2011		\$ 78,000.00	
2012		\$ 78,000.00	
2013		\$ 78,000.00	
TOTAL:	\$ -	\$ 390,000.00	\$ -
— COMPLETE FOR AMENDMENTS ONLY —		State Agency Fiscal Contact & Telephone #	
FY	Base Contract & Prior Amendments	THIS Amendment ONLY	Mason Ball, 404 James Robertson Parkway, 17th Fl. Ph: 253-7467
			State Agency Budget Officer Approval
			<i>Mason Ball</i>
			Funding Certification (certification, required by T.C.A., § 9-4-5113, that there is a balance in the appropriation from which the obligated expenditure is required to be paid that is not otherwise encumbered to pay obligations previously incurred)
TOTAL:	\$ -	\$ -	
End Date			
Contractor Ownership (complete only for base contracts with contract # prefix: FA or GR)			
<input type="checkbox"/> African American	<input type="checkbox"/> Person w/ Disability	<input type="checkbox"/> Hispanic	<input type="checkbox"/> Small Business <input checked="" type="checkbox"/> NOT disadvantaged
<input type="checkbox"/> Asian	<input type="checkbox"/> Female	<input type="checkbox"/> Native American	<input type="checkbox"/> OTHER minority/disadvantaged—
Contractor Selection Method (complete for ALL base contracts — N/A to amendments or delegated authorities)			
<input type="checkbox"/> RFP	<input type="checkbox"/> Competitive Negotiation	<input type="checkbox"/> Alternative Competitive Method	
<input checked="" type="checkbox"/> Non-Competitive Negotiation	<input type="checkbox"/> Negotiation w/ Government (eg, ID, GG, GU)	<input type="checkbox"/> Other	
Procurement Process Summary (complete for Alternative Method, Competitive Negotiation, Non-Competitive Negotiation, OR Other)			
There are no reasonable and competitive procurement alternatives to the proposed Contract. The Contractor has provided TSAC with student loan data routing services since 1998. Over thirty percent of TN schools use ELM Resources exclusively for their loan processing services which would result in a loss of that share of the market if TSAC were to use another vendor.			

**CONTRACT
BETWEEN THE STATE OF TENNESSEE,
TENNESSEE STUDENT ASSISTANCE CORPORATION
AND
ELM RESOURCES**

This Contract, by and between the State of Tennessee, TENNESSEE STUDENT ASSISTANCE CORPORATION (TSAC), hereinafter referred to as the "State" or "TSAC" and ELM RESOURCES, hereinafter referred to as the "Contractor," is for the provision of Student Loan Data Routing Services, as further defined in the "SCOPE OF SERVICES."

The Contractor is a California Mutual Benefit Corporation.

Contractor Federal Employer Identification or Social Security Number: 95-450-4552

Contractor Place of Incorporation or Organization: California

Contractor's Address:
ELM Resources
500 12th Street, Suite 300
Oakland, CA 94607

A. SCOPE OF SERVICES:

- A.1. The Contractor shall provide all service and deliverables as required, described, and detailed by this Scope of Services and shall meet all service and delivery timelines specified in the Scope of Services section or elsewhere in this Contract.
- A.2. The Contractor shall provide a common, and open information exchange and disbursement system online that connects the diverse computing platforms of schools, lenders and guarantors while providing real-time loan inquiry to borrowers and guarantors (real-time processing is limited to loan providers that participate in ELM's real-time process).
- A.3. The Contractor shall provide a student loan delivery system whereby loan requests (for guarantee) are routed to and from TSAC and schools (and their servicers) and TSAC and lenders (and their servicers).
- A.4. The Contractor shall provide mapping services to schools (and their servicers) and lenders (and their servicers) having that need such that TSAC receives guarantee requests in CommonLine file format.
- A.5. The Contractor shall provide a system allowing adjustments to loan demographics, loan changes and other data changes to be routed to and from TSAC and schools (and their servicers) and TSAC and lenders (and their servicers) depending on data flows selected by schools.
- A.6. The Contractor shall provide mapping services to schools (and their servicers) and lenders (and their servicers) having that need such that TSAC receives loan demographics and loan change records in CommonLine file format.
- A.7. The Contractor shall provide disbursement services in response to having received a notice from a lender (or its servicers). The specifics of ELM NDN services are covered separately in the ELM NDN service agreement.
- A.8. The Contractor shall provide primary customer service, training, and real time interfaces, within current data standards, to ensure that both schools and lenders receive data routed efficiently, accurately, and timely.

- A.9. TSAC shall subscribe to the Affiliate membership, entitling TSAC to the benefits of Student Loan Data Routing Services through ELM.

B. CONTRACT TERM:

This Contract shall be effective for the period commencing on December 1, 2008 and ending on November 30, 2013. The State shall have no obligation for services rendered by the Contractor which are not performed within the specified period.

C. PAYMENT TERMS AND CONDITIONS:

- C.1. Maximum Liability. In no event shall the maximum liability of the State under this Contract exceed THREE HUNDRED NINETY THOUSAND DOLLARS (\$390,000.00). The payment rates in Section C.3 shall constitute the entire compensation due the Contractor for the Service and all of the Contractor's obligations hereunder regardless of the difficulty, materials or equipment required. The payment rates include, but are not limited to, all applicable taxes, fees, overheads, and all other direct and indirect costs incurred or to be incurred by the Contractor.

The Contractor is not entitled to be paid the maximum liability for any period under the Contract or any extensions of the Contract for work not requested by the State. The maximum liability represents available funds for payment to the Contractor and does not guarantee payment of any such funds to the Contractor under this Contract unless the State requests work and the Contractor performs said work. In which case, the Contractor shall be paid in accordance with the payment rates detailed in Section C.3. The State is under no obligation to request work from the Contractor in any specific dollar amounts or to request any work at all from the Contractor during any period of this Contract.

- C.2. Compensation Firm. The payment rates and the maximum liability of the State under this Contract are firm for the duration of the Contract and are not subject to escalation for any reason unless amended.

- C.3. Payment Methodology. The Contractor shall be compensated based on the payment rates herein for units of service authorized by the State in a total amount not to exceed the Contract Maximum Liability established in Section C.1.

- a. The Contractor's compensation shall be contingent upon the satisfactory completion of units of service defined in Section A.
- b. TSAC currently participates in ELM as an ELM Affiliate Guarantor and the rate below reflects the ELM Affiliate Guarantor per loan record rate. The Contractor shall be compensated for said units based upon the following payment rates:

Service Description	Amount
Service Unit Rate Per Loan Record	\$ 0.40
Annual Affiliate Dues (Billed annually)	\$1,000
Annual Affiliate Fixed Fee (Billed annually)	\$15,000
* NOTICE: The amount(s) per compensable increment detailed above shall be contingent upon the State's receipt of an invoice (as required in section C.5., below) for said service(s) within ninety (90) days after the end of the calendar month in which the service(s) were rendered. At the sole discretion of the State, the amount per compensable increment of any service for which the State receives an invoice later than prescribed herein shall be subject to a reduction in amount of up to 100%. In the case of an untimely invoice, before any payment will be considered by the State, the Contractor must submit a written request regarding the untimely invoice, which shall detail the reason the invoice is untimely as well as the Contractor's plan for submitting all future invoices no later than prescribed herein, and it	

must be signed by an individual empowered to bind the Contractor to this Contract.

C.4. Travel Compensation. The Contractor shall not be compensated or reimbursed for travel, meals, or lodging.

C.5. Invoice Requirements. The Contractor shall invoice the State only for completed increments of service and for the amount stipulated in Section C.3, above, and as required below prior to any payment.

- a. The Contractor shall submit invoices no more often than monthly, with all necessary supporting documentation to:

Levis Hughes, Associate Executive Director for Loan Administration
TENNESSEE STUDENT ASSISTANCE CORPORATION
Suite 1510, Parkway Towers
404 James Robertson Parkway
Nashville, TN 37243

- b. The Contractor agrees that each invoice submitted shall clearly and accurately (all calculations must be extended and totaled correctly) detail the following required information.

- (1) Invoice/Reference Number (assigned by the Contractor);
- (2) Invoice Date;
- (3) Invoice Period (period to which all invoiced charges are applicable);
- (4) Contract Number (assigned by the State to this Contract);
- (5) Account Name: TENNESSEE STUDENT ASSISTANCE CORPORATION (TSAC);
- (6) Account/Customer Number (uniquely assigned by the Contractor to the above-referenced Account Name);
- (7) Contractor Name;
- (8) Contractor Federal Employer Identification Number or Social Security Number (as referenced in this Contract);
- (9) Contractor Contact (name, phone, and/or fax for the individual to contact with billing questions);
- (10) Contractor Remittance Address;
- (11) Complete Itemization of Charges, which shall detail the following:
 - i. Service or Milestone Description (including name /title as applicable) of each service invoiced;
 - ii. Number of Completed Units, Increments, Hours, or Days as applicable, of each service invoiced;
 - iii. Applicable Payment Rate (as stipulated in Section C.3.) of each service invoiced;
 - iv. Amount Due by Service; and
 - v. Total Amount Due for the invoice period.

- c. The Contractor understands and agrees that an invoice to the State under this Contract shall:

- (1) include only charges for service described in Contract Section A and in accordance with payment terms and conditions set forth in Contract Section C;
- (2) not include any future work but will only be submitted for completed service; and
- (3) not include sales tax or shipping charges.

- d. The Contractor agrees that timeframe for payment (and any discounts) begins when the State is in receipt of each invoice meeting the minimum requirements above.
 - e. The Contractor shall complete and sign a "Substitute W-9 Form" provided to the Contractor by the State. The taxpayer identification number contained in the Substitute W-9 submitted to the State shall agree to the Federal Employer Identification Number or Social Security Number referenced in this Contract for the Contractor. The Contractor shall not invoice the State for services until the State has received this completed form.
- C.6. Payment of Invoice. The payment of the invoice by the State shall not prejudice the State's right to object to or question any invoice or matter in relation thereto. Such payment by the State shall neither be construed as acceptance of any part of the work or service provided nor as an approval of any of the amounts invoiced therein.
- C.7. Invoice Reductions. The Contractor's invoice shall be subject to reduction for amounts included in any invoice or payment theretofore made which are determined by the State, on the basis of audits conducted in accordance with the terms of this Contract, not to constitute proper remuneration for compensable services.
- C.8. Deductions. The State reserves the right to deduct from amounts which are or shall become due and payable to the Contractor under this or any Contract between the Contractor and the State of Tennessee any amounts which are or shall become due and payable to the State of Tennessee by the Contractor.
- C.9. Automatic Deposits. The Contractor shall complete and sign an "Authorization Agreement for Automatic Deposit (ACH Credits) Form." This form shall be provided to the Contractor by the State. Once this form has been completed and submitted to the State by the Contractor all payments to the Contractor, under this or any other Contract the Contractor has with the State of Tennessee shall be made by Automated Clearing House (ACH). The Contractor shall not invoice the State for services until the Contractor has completed this form and submitted it to the State.

D. STANDARD TERMS AND CONDITIONS:

- D.1. Required Approvals. The State is not bound by this Contract until it is approved by the appropriate State officials in accordance with applicable Tennessee State laws and regulations.
- D.2. Modification and Amendment. This Contract may be modified only by a written amendment executed by all parties hereto and approved by the appropriate Tennessee State officials in accordance with applicable Tennessee State laws and regulations.
- D.3. Termination for Convenience. The State may terminate this Contract without cause for any reason. Said termination shall not be deemed a Breach of Contract by the State. The State shall give the Contractor at least ninety (90) days written notice before the effective termination date. The Contractor shall be entitled to receive compensation for satisfactory, authorized service completed as of the termination date, but in no event shall the State be liable to the Contractor for compensation for any service which has not been rendered. Upon such termination, the Contractor shall have no right to any actual general, special, incidental, consequential, or any other damages whatsoever of any description or amount.
- D.4. Termination for Cause. If the Contractor fails to properly perform its obligations under this Contract in a timely or proper manner, or if the Contractor violates any terms of this Contract, the State shall have the right to immediately terminate the Contract and withhold payments in excess of fair compensation for completed services. Notwithstanding the above, the Contractor shall not be relieved of liability to the State for damages sustained by virtue of any breach of this Contract by the Contractor.

- D.5. Subcontracting. The Contractor shall not assign this Contract or enter into a subcontract for any of the services performed under this Contract, as outlined in Section A of this contract, without obtaining the prior written approval of the State. If such subcontracts are approved by the State, they shall contain, at a minimum, sections of this Contract below pertaining to "Conflicts of Interest," "Nondiscrimination," and "Records" (as identified by the section headings). Notwithstanding any use of approved subcontractors, the Contractor shall be the prime contractor and shall be responsible for all work performed.
- D.6. Conflicts of Interest. The Contractor warrants that no part of the total Contract Amount shall be paid directly or indirectly to an employee or official of the State of Tennessee as wages, compensation, or gifts in exchange for acting as an officer, agent, employee, subcontractor, or consultant to the Contractor in connection with any work contemplated or performed relative to this Contract.
- D.7. Nondiscrimination. The Contractor hereby agrees, warrants, and assures that no person shall be excluded from participation in, be denied benefits of, or be otherwise subjected to discrimination in the performance of this Contract or in the employment practices of the Contractor on the grounds of disability, age, race, color, religion, sex, national origin, or any other classification protected by Federal, Tennessee State constitutional, or statutory law. The Contractor shall, upon request, show proof of such nondiscrimination and shall post in conspicuous places, available to all employees and applicants, notices of nondiscrimination.
- D.8. Prohibition of Illegal Immigrants. The requirements of Public Acts of 2006, Chapter Number 878, of the state of Tennessee, addressing the use of illegal immigrants in the performance of any Contract to supply goods or services to the state of Tennessee, shall be a material provision of this Contract, a breach of which shall be grounds for monetary and other penalties, up to and including termination of this Contract.
- a. The Contractor hereby attests, certifies, warrants, and assures that the Contractor shall not knowingly utilize the services of an illegal immigrant in the performance of this Contract and shall not knowingly utilize the services of any subcontractor who will utilize the services of an illegal immigrant in the performance of this Contract. The Contractor shall reaffirm this attestation, in writing, by submitting to the State a completed and signed copy of the document at Attachment A, hereto, semi-annually each March and October during the period of this Contract. Such attestations shall be maintained by the Contractor and made available to state officials upon request.
 - b. Prior to the use of any subcontractor in the performance of this Contract, and semi-annually thereafter, during the period of this Contract, the Contractor shall obtain and retain a current, written attestation that the subcontractor shall not knowingly utilize the services of an illegal immigrant to perform work relative to this Contract and shall not knowingly utilize the services of any subcontractor who will utilize the services of an illegal immigrant to perform work relative to this Contract. Attestations obtained from such subcontractors shall be maintained by the Contractor and made available to state officials upon request.
 - c. The Contractor shall maintain records for all personnel used in the performance of this Contract. Said records shall be subject to review and random inspection at any reasonable time upon reasonable notice by the State.
 - d. The Contractor understands and agrees that failure to comply with this section will be subject to the sanctions of Public Chapter 878 of 2006 for acts or omissions occurring after its effective date. This law requires the Commissioner of Finance and Administration to prohibit a contractor from contracting with, or submitting an offer, proposal, or bid to contract with the State of Tennessee to supply goods or services for a period of one year after a contractor is discovered to have knowingly used the services of illegal immigrants during the performance of this Contract.

- e. For purposes of this Contract, "illegal immigrant" shall be defined as any person who is not either a United States citizen, a Lawful Permanent Resident, or a person whose physical presence in the United States is authorized or allowed by the federal Department of Homeland Security and who, under federal immigration laws and/or regulations, is authorized to be employed in the U.S. or is otherwise authorized to provide services under the Contract.
- D.9. Records. The Contractor shall maintain documentation for all charges under this Contract. The books, records, and documents of the Contractor, insofar as they relate to work performed or money received under this Contract, shall be maintained for a period of three (3) full years from the date of the final payment and shall be subject to audit at any reasonable time and upon reasonable notice by the State, the Comptroller of the Treasury, or their duly appointed representatives. The financial statements shall be prepared in accordance with generally accepted accounting principles.
- D.10. Monitoring. The Contractor's activities conducted and records maintained pursuant to this Contract shall be subject to monitoring and evaluation by the State, the Comptroller of the Treasury, or their duly appointed representatives.
- D.11. Progress Reports. The Contractor shall submit brief, periodic, progress reports to the State as requested.
- D.12. Strict Performance. Failure by any party to this Contract to insist in any one or more cases upon the strict performance of any of the terms, covenants, conditions, or provisions of this Contract shall not be construed as a waiver or relinquishment of any such term, covenant, condition, or provision. No term or condition of this Contract shall be held to be waived, modified, or deleted except by a written amendment signed by the parties hereto.
- D.13. Independent Contractor. The parties hereto, in the performance of this Contract, shall not act as employees, partners, joint venturers, or associates of one another. It is expressly acknowledged by the parties hereto that such parties are independent contracting entities and that nothing in this Contract shall be construed to create an employer/employee relationship or to allow either to exercise control or direction over the manner or method by which the other transacts its business affairs or provides its usual services. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purpose whatsoever.
- The Contractor, being an independent contractor and not an employee of the State, agrees to carry adequate public liability and other appropriate forms of insurance, including adequate public liability and other appropriate forms of insurance on the Contractor's employees, and to pay all applicable taxes incident to this Contract.
- D.14. State Liability. The State shall have no liability except as specifically provided in this Contract.
- D.15. Force Majeure. The obligations of the parties to this Contract are subject to prevention by causes beyond the parties' control that could not be avoided by the exercise of due care including, but not limited to, acts of God, natural disasters, riots, wars, epidemics or any other similar cause.
- D.16. State and Federal Compliance. The Contractor shall comply with all applicable State and Federal laws and regulations in the performance of this Contract.
- D.17. Governing Law. This Contract shall be governed by and construed in accordance with the laws of the State of Tennessee. The Contractor agrees that it will be subject to the exclusive jurisdiction of the courts of the State of Tennessee in actions that may arise under this Contract. The Contractor acknowledges and agrees that any rights or claims against the State of Tennessee or its employees hereunder, and any remedies arising therefrom, shall be subject to and limited to those

rights and remedies, if any, available under *Tennessee Code Annotated*, Sections 9-8-101 through 9-8-407.

- D.18. Completeness. This Contract is complete and contains the entire understanding between the parties relating to the subject matter contained herein, including all the terms and conditions of the parties' agreement. This Contract supersedes any and all prior understandings, representations, negotiations, and agreements between the parties relating hereto, whether written or oral.
- D.19. Severability. If any terms and conditions of this Contract are held to be invalid or unenforceable as a matter of law, the other terms and conditions hereof shall not be affected thereby and shall remain in full force and effect. To this end, the terms and conditions of this Contract are declared severable.
- D.20. Headings. Section headings of this Contract are for reference purposes only and shall not be construed as part of this Contract.

E. SPECIAL TERMS AND CONDITIONS:

- E.1. Conflicting Terms and Conditions. Should any of these special terms and conditions conflict with any other terms and conditions of this Contract, these special terms and conditions shall control.
- E.2. Communications and Contacts. All instructions, notices, consents, demands, or other communications required or contemplated by this Contract shall be in writing and shall be made by certified, first class mail, return receipt requested and postage prepaid, by overnight courier service with an asset tracking system, or by email or facsimile transmission with recipient confirmation. Any such communications, regardless of method of transmission, shall be addressed to the respective party at the appropriate mailing address, facsimile number, or email address as set forth below or to that of such other party or address, as may be hereafter specified by written notice.

The State:

Tennessee Student Assistance Corporation
Richard G. Rhoda, Interim Executive Director
Parkway Towers, Suite 1900
404 James Robertson Parkway
Nashville, TN 37243
Telephone: 615.741.3605
Fax : 615.741.6230

The Contractor:

ELM Resources
Chester J. Bieganski, III, Chief Financial Officer
500 12th Street, Suite 300
Oakland, CA 94607
Phone: 510.903.1936
Fax: 510.271.0043

Secondary Contact

Jeffrey A. Connors, President and CEO
500 12th Street, Suite 300
Oakland, CA 94607
Phone: 510.903.1932
Fax: 510.271.0043

All instructions, notices, consents, demands, or other communications shall be considered effectively given upon receipt or recipient confirmation as may be required.

- E.4. Rate Increase. In the event the rate per loan record or other dues and fees as noted in Section C.3.(b). be increased by the Contractor, the Contractor shall provide the State with ninety (90) days notice, and the State shall amend said provision contingent upon all State approvals as per *Tennessee Code Annotated*, § 12-4-109, and Department of Finance and Administration Rules, Chapter 0620-3-3.
- E.3. Subject to Funds Availability. The Contract is subject to the appropriation and availability of State and/or Federal funds. In the event that the funds are not appropriated or are otherwise unavailable, the State reserves the right to terminate the Contract upon written notice to the Contractor. Said termination shall not be deemed a breach of Contract by the State. Upon receipt of the written notice, the Contractor shall cease all work associated with the Contract. Should such an event occur, the Contractor shall be entitled to compensation for all satisfactory and authorized services completed as of the termination date. Upon such termination, the Contractor shall have no right to recover from the State any actual, general, special, incidental, consequential, or any other damages whatsoever of any description or amount.
- E.4. Tennessee Consolidated Retirement System. The Contractor acknowledges and understands that, subject to statutory exceptions contained in *Tennessee Code Annotated*, Section 8-36-801, *et. seq.*, the law governing the Tennessee Consolidated Retirement System (TCRS), provides that if a retired member of TCRS, or of any superseded system administered by TCRS, or of any local retirement fund established pursuant to *Tennessee Code Annotated*, Title 8, Chapter 35, Part 3 accepts state employment, the member's retirement allowance is suspended during the period of the employment. Accordingly and notwithstanding any provision of this Contract to the contrary, the Contractor agrees that if it is later determined that the true nature of the working relationship between the Contractor and the State under this Contract is that of "employee/employer" and not that of an independent contractor, the Contractor may be required to repay to TCRS the amount of retirement benefits the Contractor received from TCRS during the period of this Contract.
- E.5. Prohibited Advertising. The Contractor shall not refer to this Contract or the Contractor's relationship with the State hereunder in commercial advertising in such a manner as to state or imply that the Contractor or the Contractor's services are endorsed. It is expressly understood and agreed that the obligations set forth in this section shall survive the termination of this Contract in perpetuity.
- E.6. Confidentiality of Records. Strict standards of confidentiality of records shall be maintained in accordance with the law. All material and information, regardless of form, medium or method of communication, provided to the Contractor by the State or acquired by the Contractor on behalf of the State shall be regarded as confidential information in accordance with the provisions of State law and ethical standards and shall not be disclosed, and all necessary steps shall be taken by the Contractor to safeguard the confidentiality of such material or information in conformance with State law and ethical standards.

The Contractor will be deemed to have satisfied its obligations under this section by exercising the same level of care to preserve the confidentiality of the State's information as the Contractor exercises to protect its own confidential information so long as such standard of care does not violate the applicable provisions of the first paragraph of this section.

The Contractor's obligations under this section do not apply to information in the public domain; entering the public domain but not from a breach by the Contractor of this Contract; previously possessed by the Contractor without written obligations to the State to protect it; acquired by the Contractor without written restrictions against disclosure from a third party which, to the Contractor's knowledge, is free to disclose the information; independently developed by the Contractor without the use of the State's information; or, disclosed by the State to others without

restrictions against disclosure. It is expressly understood and agreed the obligations set forth in this section shall survive the termination of this Contract.

- E.7. Voluntary Buyout Program. The Contractor acknowledges and understands that, for a period of two years beginning August 16, 2008, restrictions are imposed on former state employees who received a State of Tennessee Voluntary Buyout Program (VBP) severance payment with regard to contracts with state agencies that participated in the VBP.
- a. The State will not contract with either a former state employee who received a VBP severance payment or an entity in which a former state employee who received a VBP severance payment or the spouse of such an individual holds a controlling financial interest.
 - b. The State may contract with an entity with which a former state employee who received a VBP severance payment is an employee or an independent contractor. Notwithstanding the foregoing, the Contractor understands and agrees that there may be unique business circumstances under which a return to work by a former state employee who received a VBP severance payment as an employee or an independent contractor of a State contractor would not be appropriate, and in such cases the State may refuse Contractor personnel. Inasmuch, it shall be the responsibility of the State to review Contractor personnel to identify any such issues.
 - c. With reference to either subsection a. or b. above, a contractor may submit a written request for a waiver of the VBP restrictions regarding a former state employee and a contract with a state agency that participated in the VBP. Any such request must be submitted to the State in the form of the *VBP Contracting Restriction Waiver Request* format available from the State and the Internet at: www.state.tn.us/finance/rds/ocr/waiver.html. The determination on such a request shall be at the sole discretion of the head of the state agency that is a Party to this Contract, the Commissioner of Finance and Administration, and the Commissioner of Human Resources.

IN WITNESS WHEREOF:

ELM RESOURCES:

CHESTER J. BIEGANSKI, III, CHIEF FINANCIAL OFFICER DATE

PRINTED NAME AND TITLE OF CONTRACTOR SIGNATORY (above)

TENNESSEE STUDENT ASSISTANCE CORPORATION:

RICHARD G. RHODA, INTERIM EXECUTIVE DIRECTOR DATE

APPROVED:

M. D. GOETZ, JR., COMMISSIONER
DEPARTMENT OF FINANCE AND ADMINISTRATION

DATE

DEBORAH E. STORY, COMMISSIONER
DEPARTMENT OF HUMAN RESOURCES

DATE

JOHN G. MORGAN, COMPTROLLER OF THE TREASURY

DATE

ATTESTATION RE PERSONNEL USED IN CONTRACT PERFORMANCE

SUBJECT CONTRACT NUMBER:	332.05-037-039
CONTRACTOR LEGAL ENTITY NAME:	ELM RESOURCES
FEDERAL EMPLOYER IDENTIFICATION NUMBER: (or Social Security Number)	95-450-4552

The Contractor, identified above, does hereby attest, certify, warrant, and assure that the Contractor shall not knowingly utilize the services of an illegal immigrant in the performance of this Contract and shall not knowingly utilize the services of any subcontractor who will utilize the services of an illegal immigrant in the performance of this Contract.

CONTRACTOR SIGNATURE

NOTICE: This attestation MUST be signed by an individual empowered to contractually bind the Contractor. If said individual is not the chief executive or president, this document shall attach evidence showing the individual's authority to contractually bind the Contractor.

PRINTED NAME AND TITLE OF SIGNATORY

DATE OF ATTESTATION

FA CONTRACT INFORMATION SUPPLEMENT	
FOR ALL FA-TYPE CONTRACTS — COMPLETE <u>EITHER</u> SECTION A <u>OR</u> SECTION B	
Contract RFS #	332.05-037-09
Contractor:	ELM RESOURCES
SECTION A— CONTRACTOR IS AN INDIVIDUAL	SECTION B— CONTRACTOR IS A COMPANY (e.g., sole proprietorship, partnership, or corporation)
Is or has the contractor been a state employee? <input type="checkbox"/> NO (no additional information required) <input type="checkbox"/> YES	Does an individual, who is or has been a state employee, own controlling interest in (or own) the contractor company? <input checked="" type="checkbox"/> NO (no additional information required) <input type="checkbox"/> YES
Was such employment within the past six months? <input type="checkbox"/> NO <input type="checkbox"/> YES (an approved rule exception permitting a contract within six months of employment is also required)	Was such employment within the past six months? <input checked="" type="checkbox"/> NO <input type="checkbox"/> YES (an approved rule exception permitting a contract within six months of employment is also required)
Does the contractor receive Tennessee Consolidated Retirement System (TCRS) retirement benefits? <input type="checkbox"/> NO <input type="checkbox"/> YES (the procuring agency general counsel MUST sign an analysis of this procurement using the TCRS analysis guidelines)	Does the individual who owns controlling interest in the contractor company receive Tennessee Consolidated Retirement System (TCRS) retirement benefits? <input checked="" type="checkbox"/> NO <input type="checkbox"/> YES (the procuring agency general counsel MUST sign an analysis of this procurement using the TCRS analysis guidelines)
CONTRACTOR SIGNATURE	
CHESTER J. BIEGANSKI, III, CHIEF FINANCIAL OFFICER	
CONTRACTOR	DATE